(3)

Supreme Court, U.S.
FILED
MAY 26 2005
OFFICE OF THE CLERK

No. 04-1148

IN THE

Supreme Court of the United States

VLADIMIR RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

DONALD B. AYER
CHRISTIAN G. VERGONIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

LISA WALSH
GONZALEZ & WALSH LLP
1401 Brickell Avenue
Suite 1000
Miami, Florida 33131
(305) 577-1056

MEIR FEDER
(*Counsel of Record*)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Petitioner

May 26, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. THE QUESTION PRESENTED AFFECTS A MASSIVE NUMBER OF CASES 1

II. DIFFERING TREATMENT OF DEFENDANTS IN DIFFERENT CIRCUITS IS PARTICULARLY INAPPROPRIATE IN LIGHT OF THE SENTENCING REFORM ACT'S GOAL OF UNIFORMITY 4

III. THE CIRCUITS' BASIC DISAGREEMENTS ABOUT THE PROPER APPROACH TO PLAIN-ERROR REVIEW ARE CERTAIN TO RECUR OUTSIDE THE *BOOKER* CONTEXT 5

CONCLUSION 8

TABLE OF AUTHORITIES

Federal Cases

Blakely v. Washington, 124 S. Ct. 2531 (2004) 2
Chapman v. United States,
500 U.S. 453 (1989) 4
Jones v. United States,
527 U.S. 373 (1999) 6
Koon v. United States,
518 U.S. 81 (1996) 4
Mistretta v. United States,
488 U.S. 361 (1989) 4
United States v. Booker, 125 S. Ct. 738 (2005) ..... *passim*
United States v. Dominguez Benitez,
124 S. Ct. 2333 (2004) 5, 6
United States v. Gonzalez-Huerta,
403 F.3d 727 (10th Cir. 2005) 5
United States v. MacKinnon,
401 F.3d 8 (1st Cir. 2005) 5
United States v. Pirani, No. 03-2871,
2005 WL 1039976 (8th Cir. Apr. 29, 2005) 7

Federal Statutes

28 U.S.C. § 994 4

Other Authorities

U.S. Sentencing Commission,
2003 Sourcebook of Federal Sentencing Statistics 2, 3

INTRODUCTION

The Government acknowledges the need for certiorari in this case, and offers three compelling reasons in support of that conclusion: (1) "There is a clear and deep multi-circuit conflict on the proper analysis of plain *Booker* error"; (2) the eleven circuits to address the issue "have adopted three different broad approaches, with further variations within each broad category"; and (3) "[s]ome of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review" that will potentially recur in other contexts. (Brief for the United States ("Br.") 19.)

These critical points advanced by the Government merit elaboration beyond what the Government has said. *First*, although the circuit split at issue applies principally to cases in which the sentences were imposed before *Booker*, that category comprises massive numbers of cases; indeed, this Court alone has granted, vacated, and remanded more than 700 cases in light of *Booker*, almost all of which are likely to present plain-error issues. *Second*, allowing vast differences in the treatment of similarly situated defendants based solely on the Circuit in which sentencing occurs is repugnant to the Sentencing Reform Act's central goal of eliminating such disparities. *Third*, the divergent court of appeals decisions reflect basic and significant disagreements concerning plain-error analysis that are certain to recur in this and other contexts, including differences over what constitutes a "reasonable probability" of a different result and over whether a court of appeals may delegate the task of assessing that probability to the district court.

ARGUMENT

I. THE QUESTION PRESENTED AFFECTS A MASSIVE NUMBER OF CASES

As the Government rightly notes (Br. 18), the *Booker* plain-error issue presented here applies, most immediately, to a particular universe of cases: cases on direct appeal in

which the sentences were imposed under the federal Sentencing Guidelines, without Sixth Amendment objection, prior to *Booker*.[1] It is equally important to note, however, that that universe of cases is an extraordinarily large one: In the most recent year for which statistics are available, more than 70,000 criminal defendants were sentenced under the Guidelines, *see* United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics* (hereinafter *2003 Sourcebook*), tbl. 2, and — as the Government recognizes (Br. 18) — Sixth Amendment objections were rare before this Court's decision less than one year ago in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and were not uniformly made, even after *Blakely*, until the decision in *Booker*.[2]

Although it cannot be definitively ascertained how many such cases remain on direct appeal, that category includes, at a minimum, the *more than 700 cases* granted, vacated, and remanded by this Court in light of *Booker*.[3] It also includes an indeterminate but undoubtedly larger number of cases that were still before the courts of appeals when *Booker* was decided. As noted in the Petition, after *Booker* the Second Circuit — which accounts for only a small percentage of sentencing appeals — identified more than 200 decided

---

[1] As discussed in Point III of this Reply, the split in the Circuits over the proper application of plain-error review also has much broader significance beyond the *Booker* plain-error cases.

[2] As detailed in the Petition, prior to *Blakely* it was settled in every Circuit with criminal jurisdiction that the Sentencing Guidelines were constitutional. (Pet. 9 n.4.)

[3] Given the time required for a case to work its way from sentencing through scheduling, briefing, argument, and decision in a court of appeals, to this Court's decision on a petition for certiorari, the overwhelming majority of the cases granted, vacated, and remanded by this Court necessarily involves sentences imposed prior to *Blakely*. As noted, in pre-*Blakely* cases Sixth Amendment objections to the Guidelines were rarely raised in the district court.

cases presenting potential *Booker* plain-error and harmless-error claims in which the Circuit had not yet issued its mandate; that number did not even include appeals presenting such issues that (like this case) were undecided at the time of *Booker*. And the various Circuits continue on a daily basis to hand down decisions turning on the *Booker* plain-error issue presented here.

Finally, it is worth noting that the number of defendants affected by the question presented will not be significantly reduced by any resentencings ordered prior to this Court's decision in this case. The three Circuits that have generally ordered resentencing in the case of Sixth Amendment error (the Third, Fourth, and Sixth) account for only about 20% of federal sentences. *2003 Sourcebook*, tbl. 2. In contrast, the four Circuits that have taken the strict view articulated below (the First, Fifth, Eighth, and Eleventh) account for nearly 40% of all sentences, and more than one-half of the cases granted, vacated, and remanded by this Court following *Booker*. *Id.*[4]

In short, this Court's resolution of the deep conflict at issue here will necessarily affect hundreds, and more likely thousands, of cases.

---

[4] The balance of cases are in three Circuits that have taken the middle course of having the district court decide whether resentencing is appropriate (the Second, Seventh, and D.C. Circuits), the Ninth Circuit, in which the issue is pending *en banc*, and the Tenth Circuit, which has not taken a clear position on the remedy for constitutional *Booker* error. There are doubtless numerous defendants in those Circuits, too, who will not be resentenced absent a ruling by this Court.

II. DIFFERING TREATMENT OF DEFENDANTS IN DIFFERENT CIRCUITS IS PARTICULARLY INAPPROPRIATE IN LIGHT OF THE SENTENCING REFORM ACT'S GOAL OF UNIFORMITY

The drastically different approaches of the various Circuits is particularly problematic in the sentencing context, given the importance Congress has attached to treating similarly situated defendants similarly. As this Court recognized in *Booker*, "Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing." *Booker*, 125 S. Ct. at 762 (majority opinion of Breyer, J.); *see also id.* at 761 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.").

The importance of this goal to Congress has long been recognized by this Court. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court's first case addressing the Guidelines, the Court observed that Congress found the previous "great variation among sentences" "unjustified" and "shameful," and "a serious impediment to an evenhanded and effective operation of the criminal justice system." *Id.* at 366. The Court has likewise noted that "[t]he goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. 81, 113 (1996); *see also, e.g., Chapman v. United States*, 500 U.S. 453, 473 (1991) (Stevens, J., dissenting) ("[O]ne of the central purposes of the Sentencing Guidelines . . . was to eliminate disparity in sentencing."); 28 U.S.C. § 994(f) (directing the Sentencing Commission to pay "particular attention to the [statutory] requirements . . . for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities").

The effect of the current split in the Circuits over plain *Booker* error, however, is to produce dramatic disparities among otherwise-similar defendants based solely on the Circuit in which they are located.[5] Such a result is directly contrary to Congress's intention to eliminate unjustified sentencing disparities. As Judge Lucero noted in *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005), "[t]his wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court." *Id.* at 763 (Lucero, J., dissenting).

III. THE CIRCUITS' BASIC DISAGREEMENTS ABOUT THE PROPER APPROACH TO PLAIN-ERROR REVIEW ARE CERTAIN TO RECUR OUTSIDE THE *BOOKER* CONTEXT

Even aside from the importance of the question presented in the numerous cases involving plain *Booker* error, the Government is plainly correct — indeed, it vastly understates — in noting that the split among the courts of appeals "illuminate[s] basic disagreements about the proper approach to plain-error review" that "have the potential to affect criminal cases not involving *Booker* error." (Br. 19). The three-way division among the Circuits revolves around the third prong of the plain-error test, specifically the requirement that the appellant show a "reasonable

---

[5] The few cases the Government cites in which the stricter Circuits have found the plain-error test satisfied (Br. 12 n.4), serve only to emphasize the unfair disparate treatment of defendants. The cited cases all depend on gratuitous statements by a district judge at sentencing expressing disagreement with the Guidelines range. *E.g.*, *United States v. MacKinnon*, 401 F.3d 8, 11 (1st Cir. 2005) (judge pronounced Guidelines sentence "unjust, excessive, and obscene"). Allowing the plain-error question to turn on the happenstance of whether a district judge chose to editorialize about the Guidelines increases, rather than minimizes, the unjustified differences in treatment of similarly situated defendants.

probability" of a different result, and what suffices to show that such a "reasonable probability" exists. *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004). The "reasonable probability" standard is fundamental to plain-error analysis, and resolution of the Circuits' disagreements concerning its proper application will necessarily affect a host of plain-error cases outside the *Booker* context.

For example, the question presented in this case raises an important question of broad significance concerning the quantum of proof required to establish "reasonable probability." This Court emphasized in *Dominguez Benitez* that the "reasonable probability" test "should not be confused with[] a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." *Id.* at 2340 n.9. As the Court stated, the defendant need only show a probability "sufficient to undermine confidence in the outcome of the proceeding." *Id.* at 2340 (internal quotation marks omitted). However, as described in greater detail in the Petition (Pet. 16-20), the Eleventh Circuit and the Circuits following it read *Jones v. United States*, 527 U.S. 373 (1999) — in conflict with *Dominguez Benitez* — to *require* proof by a preponderance, holding that a "reasonable probability" is not established even where the evidence is in equipoise, *i.e.*, where "[t]he record provides no reason to believe any result is more likely than the other." Pet. App. 17a.[6] None of the remaining Circuits has required such a preponderance showing, and, in

---

[6] The Government contends that the Eleventh Circuit's analysis was not inconsistent with *Dominguez Benitez* (Br. 8), but, notably, the Government does not expressly deny that the Eleventh Circuit adopted a preponderance standard. Indeed, the Eleventh Circuit's holding that an appellant must show more than that the evidence is in equipoise is the very *definition* of a preponderance standard. *See also, e.g.*, Pet. App. 15a ("[T]he defendant [must] show that the error actually did make a difference: if it is equally plausible that the error worked in favor of the defense, the defendant loses.").

fact, many Circuits do not appear to have adopted any consistent or determinate definition of "reasonable probability" for purposes of plain-error analysis. This central question about the meaning of "reasonable probability" is clearly important in *all* plain-error analysis, well beyond the *Booker* context, and it makes resolution of the question presented all the more critical in this case.

Further, the question presented raises the broadly significant question of *who* assesses whether a "reasonable probability" has been shown. The Second, Seventh, and D.C. Circuits, reasoning that the district courts are better situated to determine whether the defendant's sentence would have been different under a discretionary system, have adopted the approach of remanding cases to the district courts to make that determination. (*See* Pet. 11-12; Br. 13-15). Other Circuits, including the court below, have held that the courts of appeals have no authority to delegate the determination of such questions to district courts. *See, e.g.*, Pet. App. 26a (no "authority to delegate the decision of whether there has been plain error to the very court whose judgment is being reviewed"); *United States v. Pirani*, No. 03-2871, 2005 WL 1039976, at *6 (8th Cir. Apr. 29, 2005) (en banc). This disagreement, too, has obvious consequences beyond the *Booker* context, as there are numerous circumstances in which courts of appeals may find that the district court is better situated to determine the effect of a plain legal error on the outcome of the case. In at least the Second, Seventh, and D.C. Circuits, the court of appeals may choose to delegate that plain-error determination to the district court. In contrast, the Circuits in agreement with the Eleventh Circuit would consider such delegation to the district court impermissible. The disagreement among the Circuits on this important threshold question applicable in all plain-error cases provides further justification for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD B. AYER
CHRISTIAN G. VERGONIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

LISA WALSH
GONZALEZ & WALSH LLP
1401 Brickell Avenue
Suite 1000
Miami, Florida 33131
(305) 577-1056

MEIR FEDER
(*Counsel of Record*)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Petitioner

May 26, 2005